



## CLOSING LOOPHOLES NO. 2 BILL FINALLY PASSES BOTH HOUSES OF PARLIAMENT – HERE'S WHAT TO EXPECT

**Authors:** Greg Robertson and Disha Mehta

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The passing of the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 ("**Bill**") marks the second round of reforms to the *Fair Work Act 2009* (Cth) ("**FW Act**"), initiated by Minister for Employment and Workplace Relations, Hon Tony Burke MP.

After a round of Senate public hearings from September 2023 to January 2024, the Bill was finally passed in both Houses of Parliament earlier this month. The Bill needs Assent by the Governor General to become law (a formality under the Australian Constitution), and the provisions will then operate from a variety of dates measured from the date of Assent, as set out below.

Building upon the initial changes implemented under the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, this Bill makes changes such as the definition of employees and employers, rights for casual workers, protections for independent contractors, and the establishment of a statutory right to disconnect outside of work hours. Here are some key highlights of these changes.

### CHANGES TO THE TEST FOR CASUAL EMPLOYEES (to operate 6 months from Assent)

The Bill repeals and replaces the current section 15A of the *Fair Work Act 2009* (Cth) ("**FW Act**"), the section that defines casual employment. The new test is based on whether there is a work relationship characterised by no firm advance commitment to ongoing and indefinite work. In determining whether the employment relationship is characterised by an

absence of a firm advance commitment to continuing and indefinite work, the Bill sets out the following criteria:

- consideration of the "real substance, practical reality and true nature of the employment relationship";
- consideration that a firm advance commitment may be in the form of a mutually agreed term in a contract of employment or a mutual understanding or expectation between an employer and employee;
- whether there is an inability of the employer to elect to offer work or an inability of the employee to elect to accept or reject work;
- whether it is reasonably likely that continuing work of the kind performed by the employee will be available in future; and
- if the employee engages in a regular pattern of work, noting that a pattern of work will be regular even if it is not absolutely uniform and includes some fluctuations and variations over time.

Employees can either seek to be converted to permanent employees or apply to the Fair Work Commission to change their employment status by applying the above criteria. The Commission will have additional powers to deal with disputes about casual employment. It will also be a civil remedy offence to misrepresent employment as casual.

Notably, the onus will now be on the casual employee to make a request to change their employment status (once certain thresholds are met, including that the employee has been employed for at least 6 months (or 12 months for small business employers)). This is a significant divergence from the former provisions, under which, employers were obligated to make a determination regarding offering permanent employment to an employee within 21 days after the employee completes working for the employer for a 12 month period.



### **NEW “ORDINARY MEANING” OF EMPLOYEE AND EMPLOYER (to operate 6 months from Assent or earlier by Proclamation)**

For the purposes of the FW Act, the Bill changes the current test for determining whether a worker is an employee or an independent contractor, which relies on the terms of the contract between the parties (irrespective of the way the relationship operates) following the High Court decisions in *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. For the most part, the new definition reverts to a multi-factorial test under the common law as understood before those decisions—expressly providing that in determining whether a worker is an employee, the task is to determine the real substance, practical reality, and true nature of the relationship, with the following factors to be considered:

- the totality of the relationship;
- the terms of the contract governing the relationship; and
- other factors relating to the totality of the relationship including, but not limited to, how the contract is performed in practice.

### **SHAM CONTRACT ARRANGEMENTS (to operate the day after Assent)**

Currently, section 357 of the FW Act sets out that employers are liable for representing to an individual that they are under a “contract for services” rather than a contract of employment. The current defence available to employers is that when the representation was made, the employer “did not know and was not reckless” as to whether the contract was a contract of employment rather than a contract for services.

After coming into effect, the Bill will replace the current defence with a stricter defence—employers will be required to prove that they “reasonably believed” that the contract was a contract for

services. The relevant criteria for the defence would include the size and nature of the employer’s enterprise and other factors such as legal or professional advice.

### **GIG ECONOMY WORKERS AND ROAD TRANSPORT CONTRACTORS (to operate 6 months from Assent or earlier by Proclamation)**

A new Part has been introduced to the FW Act that seeks to identify “employee-like workers” and “road transport contractors” who traditionally do not fit within the mould of employee but perform work with majority characteristics of an employee.

Employee-workers include persons who perform work on a digital platform and have one of the following characteristics:

- low bargaining power in negotiations;
- receive remuneration at or below the rate of an employee performing comparable work; and
- low degree of authority over the performance of the work.

Employee-like workers and road transport contractors will be able to apply to the Fair Work Commission for “Minimum Standard Orders” or “Minimum Standard Guidelines”. Alternatively, they may negotiate and enter into “collective agreements” directly with the digital labour platform.

Minimum standard orders and minimum standard guidelines may include the following terms:

- payment terms;
- deductions;
- record-keeping;
- insurance;
- consultation;
- representation;
- delegates’ rights; and
- cost recovery.



Further, employee-like workers will be able to apply to the Fair Work Commission for orders in relation to unfair deactivations, unfair terminations and unfair contracts.

### **INTRACTABLE BARGAINING DISPUTES (to operate the day after Assent)**

Currently, the Fair Work Commission has power to resolve intractable bargaining disputes by making an intractable bargaining declaration on application by a single bargaining representative. If an intractable bargaining declaration is made, the Commission must make a workplace determination as quickly as possible.

The Bill introduces a new section 270A which states that a workplace determination, other than in respect of wage increases and agreed terms, must not be less favourable to employees or employee organisations than corresponding terms in existing enterprise agreements.

### **WORKPLACE DELEGATES' RIGHTS (to operate 6 months from Assent or earlier by Proclamation)**

A new definition of a "workplace delegate" has been inserted, with accompanying rights. A workplace delegate is a person who is appointed or elected in accordance with the rules of an "employee organisation" to be a delegate or representative for members of the organisation who work in a particular enterprise (including trade unions and other registered organisations).

Workplace delegates will have express rights, such as:

- ability to communicate with other employees who are current or prospective union members;
- reasonable access to the workplace to undertake their duties as delegates; and
- paid time during normal working hours to attend training in relation to their role (except for employees of small businesses).

Modern awards, enterprise agreements and workplace determinations will be required to contain clauses providing for these workplace delegate rights. An employer who fails to provide a workplace delegate with the new entitlements will be liable under the General Protections provisions of the FW Act.

### **RIGHT TO DISCONNECT (to operate 6 months after Assent; for small business, 18 months after Assent)**

A new right, inserted at the last hour of Senate debates, will now give employees the right to refuse to monitor, read or respond to contact (or attempted contact) from an employer outside of their working hours – unless that refusal is unreasonable. The right also extends to contact (or attempted contact) outside of the employee's working hours from a third party if work related (for example, from customers or clients).

Some of the factors that must be considered in determining whether an employee's refusal to be contacted is unreasonable are:

- the reason for the contact or attempted contact;
- how the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- the extent to which the employee is compensated (including non-monetary compensation) to remain available to perform work or be contacted, or for working additional hours, outside of ordinary working hours;
- the nature of the employee's role and the employee's level of responsibility; and
- the employee's personal circumstances (including family or caring responsibilities).

The Fair Work Commission will have the power to make an order to stop refusing contact, to stop taking certain actions, or to otherwise deal with the dispute. This will also be civil remedy provision, meaning that breach of an order could attract penalties.





## KEY ACTION POINTS FOR HUMAN RESOURCES AND IN-HOUSE COUNSEL

- Review your current employment/contractor arrangements and consider whether any of them may fall under the new reforms.
- In particular, if your organisation utilises casual employees, ensure your contracts and systems comply with the new provisions.
- Gain an understanding of any union activities in your organisation to ensure that you comply with your obligations to union members and delegates.
- Consider implementing policies relating to outside work hours contact and the right to disconnect.

We recommend to clients that they further familiarise themselves with these changes and, if necessary, seek advice about how to ensure compliance with the new legal obligations.

Please call our Harmers legal team at +61 2 9267 4322 if you require advice or assistance.

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### SYDNEY

Level 27, 31 Market Street  
Sydney NSW 2000  
tel: (02) 9267 4322  
fax: (02) 9264 4295

### MELBOURNE

Level 40, 140 William Street  
Melbourne VIC 3000  
tel: (03) 9612 2300  
fax: (03) 9612 2301  
[www.harmers.com.au](http://www.harmers.com.au)

### BRISBANE

Level 19, 10 Eagle Street  
Brisbane QLD 4000  
tel: (07) 3016 8000  
fax: (07) 3016 8001